IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 43 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

B.B.VYAS

Appearance:

1. INCOME TAX REFERENCE No. 43 of 1988
MR MANISH R BHATT for Petitioner No. 1
MR PRANAV G DESAI for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.L.DAVE

Date of decision: 16/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

#. The Income-tax Appellate Tribunal, Ahmedabad Bench "B" has referred the following question for the opinion of this Court under Section 256(1) of the Income-tax Act, 1961.

"Whether in law and on facts Circular No. 88 dated 1.8.1969 issued by the CBDT but subsequently withdrawn on 23.9.1971 was applicable and the cost of acquisition had to be determined on the basis of the value as determined on the date of conversion of agricultural land into non-agricultural land i.e. when the land became a capital asset?"

#. The matter pertains to the Assessment Year 1971-72. The assessee is an individual. In the assessment proceedings under Section 143(3), the Income-tax Officer, while computing capital gains was of the opinion that the cost of land in question to the previous owner worked out at Rs. 1.10 ps. per sq. yd. was to be given deduction for computation of the capital gain made by the assessee in respect of which the land which was sold during the Assessment Year in question. In the assessment proceedings, the assessee, while computing the capital gains, took cost of the acquisition of the land as their value on the date of the gift. The lands were purchased as agricultural lands in 1961 and thereafter converted into non-agricultural land on March 12, 1962 and gifted in July, 1966 when they were valued for the purpose of Gift Tax at Rs. 9.00 per sq. yd. According to the assessee the land became capital asset on the date when converted into the non-agricultural land on March 12, 1962, and, therefore, since it was not capital asset as defined under Section 2(14) at the time of their acquisition, its cost at the time of acquisition, cannot be taken into consideration for the purposes of computation of the capital gains. The assessee placed reliance on the Circular dated 1st August, 1969 issued by the Central Board of Direct Taxes. As per that Circular, the assessee was entitled to determine the cost of the acquisition on the basis of the conversion of agricultural land into non-agricultural land. The Income-tax Officer rejected the claim of the assessee, which order was upheld by the Assistant Appellate Commissioner. The Tribunal however held that the Circular issued by the CBDT was of a benevolent nature

and applied in the case of the assessee in respect of the Assessment Year 1971-72, because it was in force from the date of the Assessment Year, though later on it came to be withdrawn on 23.9.1971.

#. Though the question which is referred mentions number of the Circular as "88", dated 1.8.69, these orders are in Instruction No. 90 which was issued on 1.8.69, a copy of which is placed on record before us. The learned counsel for the Revenue has, during the proceedings, at our instance, after frantic efforts been able to trace out these relevant Instructions which are the subject of the matter of the proceedings. The Instructions issued by the Board on 1.8.69 read as follows.

"Section 48 of the Income-tax Act, 1961, prescribes the mode of computation of the income chargeable under the head "Capital Gain". It, inter alia, allows a deduction for the cost of the acquisition of the capital asset concerned. A question has arisen as to how the "cost of acquisition of the capital asset" should be determined for the purpose of the levy of the capital gains tax under Section 45 in a case where agricultural land is converted into non-agricultural land and then sold for non-agricultural use.

2. "Capital asset" as defined in Section 2 (14) of the Income-tax Act includes property held by the assessee but does not include agricultural land and so long as the property remains an agricultural land, it is, in law, not a capital asset at all.

The expression "cost of acquisition of the capital asset" for the purpose of Section 48 has, therefore, to be understood with reference to the legal meaning of the expression "capital asset". When an asset is not a capital asset as defined in the Act, it will not obviously be a capital asset for the purposes of Section 48. It is only when the agricultural land is converted into a non-agricultural land what the land becomes is a capital asset as defined in the Act. Therefore, the relevant date for the purpose of determining the cost of the acquisition of the capital asset whose sale is the subject matter of the levy of the capital gains tax, is the date on which the agricultural land had been converted into a non-agricultural land. Such cost of acquisition

may reasonably be taken, in accordance with the principles enunciated by the Supreme Court in the case of C.I.T. Vs. Bai Shirin Bai K. Kuka (46 ITR 86), to be the market price of the land at the point of time when the agricultural land is converted into non-agricultural land.

3. The cases of the type in question are to be decided under the provisions of Section 48(ii) as clarified above and Sections 49 and 55 (2) would not apply."

There is no dispute about the fact that the above Instructions were in force at the relevant time. Therefore, subsequent withdrawal of these Instructions will not affect their operation. These Instructions have, obviously been issued under Section 119 of the said Act by the Board and they were biding on the subordinate authorities. The Instructions clearly indicated that since the definition of "capital asset" in Section 2(14) of the Act did not include the agricultural land, it would become capital asset only on being converted into non-agricultural land. Since the Circular was operative and binding on the subordinate revenue authorities under the law, the Tribunal has not committed any error in holding that the Circular was applicable in the case of the assessee and in directing the Income-tax Officer to determine the cost of the acquisition on the basis of the value of land as determined on the date of its conversion into non-agricultural land. The question referred to this Court is, therefore, answered in the affirmative against the Revenue and in favour of the assessee. The Reference stands disposed of accordingly with no order as to costs.

[R.K. ABICHANDANI, J.]

[A.L. DAVE, J.]
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